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No. 00-1531

IN THE

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. §252(e)(6) grants a federal district court jurisdiction to review decisions of a state commission enforcing or interpreting previously approved interconnection agreements.

2. Whether a federal district court has subject matter jurisdiction under 28 U.S.C. §1331 to review state commission orders rendered pursuant to the Telecommunications Act of 1996 where suit under 47 U.S.C. §22(e)(6) is barred pursuant to the Eleventh Amendment to the United States Constitution.

3. Whether a state commission waives its sovereign immunity by participating in the administration of the Telecommunications Act of 1996.

4. Whether the Ex parte Young doctrine authorizes suit against the individual state commissioners for actions taken pursuant to the Telecommunications Act of 1996.

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BRIEF IN OPPOSITION

The Maryland Public Service Commission and the individual Commissioners acting in their official capacity (collectively "the Maryland Commission") respectfully respond to the petition for writ of certiorari filed by Verizon Maryland, Inc. ("Verizon") seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit.

The petition for certiorari seeks review of the Fourth Circuit's decision holding that the Maryland Commission did not waive its Eleventh Amendment immunity to federal district court review when it implemented the Telecommunications Act of 1996. 47 U.S.C. §251 et. seq. ("1996 Act") Verizon also seeks review of the Fourth Circuit's holding that the *Ex parte Young*[1] doctrine does not permit an action against the individual commissioners in their official capacity. Further, Verizon seeks review of the Court of Appeals' finding that a State commission's action interpreting or enforcing an interconnection agreement under the 1996 Act was not a "determination" under 47 U.S.C. §252 (e)(6). Finally, Verizon seeks review of the Fourth Circuit's holding that 28 U.S.C. §1331 does not provide a federal district court with independent subject matter jurisdiction to review determinations rendered by a State commission pursuant to the 1996 Act.

As noted by Verizon, three of the Fourth Circuit's holdings raise questions substantially identical to those on which this Court granted certiorari in *Mathias v. Worldcom Techs., Inc.*, No. 00-878 (March 5, 2001). The Fourth Circuit itself recognized that its holdings with regard to the constructive waiver of Eleventh Amendment immunity, the application of the *Ex parte Young* doctrine and the scope of §252(e)(6) of the 1996 Act conflict with decisions in other jurisdictions. (Pet. App. 20a, 30a and 44a-45a)[2] In light of the conflict among the circuit courts with regard to issues discussed above, the Maryland Commission does not oppose certiorari on these questions. However, the Maryland Commission's decision not to oppose certiorari should not be viewed as signaling agreement with the substantive arguments raised by Verizon before the Fourth Circuit. On

[1] *Ex parte Young*, 209 U.S. 123 (1908).

[2] "Pet. App." Refers to the Appendix to Verizon Maryland, Inc.'s Petition No. 00-1531.

the merits, the Maryland Commission disagrees with Verizon's presumed position and believes, as summarized below,[3] that the Fourth Circuit's decision on these issues is correct.

Verizon raises a fourth question which is not at issue in *Mathias*. The Fourth Circuit also held that 28 U.S.C. §1331 does not give a federal district court subject matter jurisdiction to review State commission actions taken pursuant to the 1996 Act. Verizon's §1331 argument does not merit further review. Verizon's claim of a conflict with the Sixth Circuit is spurious. Moreover, as discussed below, the Court of Appeals was correct in holding that federal district courts do not have independent subject matter jurisdiction under §1331 to review State commission decisions rendered pursuant to the 1996 Act.

STATEMENT OF THE CASE

This case involves federal court review of an order entered by the Maryland Commission. The Maryland Commission is an agency of the State of Maryland and it supervises and regulates telecommunications carriers in Maryland. As part of its responsibilities, the Maryland Commission administers and enforces the *Public Utility Companies Article* of the Maryland Code. Final orders or decisions of the Maryland Commission are subject to judicial review in Maryland circuit courts, *Public Utility Companies Article* §3-204 of the Annotated Code of Maryland. Parties

[3] Verizon's Petition presents no argument on the merits regarding these three issues. The Maryland Commission will postpone until its merits brief a full discussion of the Fourth Circuit's correct judgment on these issues. However, in light of the importance of these constitutional questions, certain points require discussion even at this early stage.

are entitled to further review by the Maryland Court of Special Appeals. *Id.* at §3-209.

This case began at the Maryland Commission when Verizon filed a request for declaratory ruling asking that the Maryland Commission find that Verizon was not obligated under §251 of the 1996 Act to pay reciprocal compensation for calls delivered to Internet Service Providers ("ISPs") who are served by competitive local exchange carriers ("CLECs"). The Maryland Commission issued a declaratory ruling finding that Verizon must continue to pay reciprocal compensation and Verizon sought review of this order pursuant to §252(e)(6) of the 1996 Act and 28 U.S.C. §1331.

A. THE TELECOMMUNICATIONS ACT OF 1996

Congress enacted the 1996 Act, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §251 et seq.) to open the local telecommunications markets to competition.[4] The 1996 Act[5] imposes a general duty on all telecommunications carriers to interconnect with other telecommunications carriers. 47 U.S.C. §251(a). With regard to incumbent local exchange carriers ("ILECs") such as Verizon, the duty to interconnect is even more specifically defined by §251(c)(2). In conjunction with these interconnection obligations, the

[4] At the time the 1996 Act was passed, 19 states had in place rules opening the local exchange market to competition. In seven states, competing firms already had begun to offer switched local service. These states were California, Illinois, Maryland, Massachusetts, Michigan, New York and Washington. Competition rules were in place in Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Louisiana, North Carolina, Ohio, Oregon, Tennessee and Virginia. See, *Common Carrier Competition Report*, CC Report No. 96-9, FCC, Common Carrier Bureau (Spring 1996) at page 3.

[5] *See*, 47 U.S.C. §§251-261. The 1996 Act is codified throughout Title 47 of the United States Code. References to the 1996 Act are to the relevant sections of the Code.

1996 Act requires all local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. §251(b)(5). For purposes of compliance with this subsection, the 1996 Act provides that such terms and conditions must provide for the recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carriers. Further, such terms and conditions must determine costs on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. §252(d)(2)(A). However, ILECs may negotiate and enter in a binding agreement with a requesting carrier without regard to the standards set forth in subsections (b) and (c) of §251.

The procedures for negotiations between Competitive Local Exchange Carriers ("CLECs") and ILECs are governed by §252 of the 1996 Act. If negotiating companies cannot reach agreement, §252 provides that the parties may request that the appropriate State commission arbitrate unresolved issues. Each interconnection agreement must be submitted to the State commission for approval, regardless of whether the agreement was negotiated by the parties or arbitrated by the State commission. 47 U.S.C. §252(e)(1). However, the State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier, or the implementation of such an agreement is not consistent with the public interest. 47 U.S.C. §252(e)(2)(A).

B. PROCEEDINGS BEFORE THE MARYLAND COMMISSION

Pursuant to the 1996 Act, MFS Intelenet of Maryland, Inc. ("MFS") and Verizon entered into an interconnection agreement on July 16, 1996. The Maryland

Commission approved this agreement on October 9, 1996. On April 28, 1997, Verizon informed MFS that it would discontinue payment of reciprocal compensation for calls to ISPs, claiming that the Agreement's reciprocal compensation provisions did not apply to calls to ISPs. On May 21, 1997, MFS filed a complaint with the Maryland Commission alleging that the actions of Verizon violated the 1996 Act and the MFS Agreement. On September 11, 1997, the Maryland Commission found that Verizon must pay reciprocal compensation to MFS for calls to ISPs under the terms of the Agreement. The Maryland Commission's decision was upheld by the Circuit Court for Montgomery County, Maryland.[6]

The Maryland Commission considered this issue a second time within the context of a Sprint Communications Company, L.P. ("Sprint") complaint. Sprint filed a Motion for Resolution of Disputed Issue, seeking a Commission ruling on how ISP-bound calls should be treated. The Maryland Commission concluded that ISP-bound calls "are classified as local in nature and are therefore, subject to reciprocal compensation" from Verizon.

On February 26, 1999, the Federal Communications Commission ("FCC") released an Order addressing the jurisdictional status of calls to ISPs.[7] The FCC concluded that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate." However, the FCC further concluded that given the absence of a "federal rule regarding the appropriate inter-carrier compensation mechanism for this traffic, that parties should be bound by their existing interconnection agreements, as interpreted by State

[6] Civil Action No. 178260, Docket Entry #26, March 26, 1998.

[7] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling, CC Docket 96-96, 14 F.C.C.R. 3689 (February 26, 1999). ("*ISP Order*")

commissions."[8] In response to the FCC Order, Verizon asked the Maryland Commission to reconsider the previous decisions requiring reciprocal compensation for calls to ISPs.

On June 11, 1999, the Maryland Commission, resolved the issue raised by Verizon. The Order has two distinct parts. First, with regard to the MFS Agreement, the Commission found that, under contract principles and using the analysis sanctioned by the FCC, parties to the MFS Agreement are entitled to reciprocal compensation for ISP-bound calls until July 1, 1999. (Pet. App. 103a-104a) Second, the Maryland Commission determined that parties who do not have approved interconnection agreements should receive the arbitrated reciprocal compensation rates contained in the effective Statement of Generally Available Terms ("SGAT") as an interim compensation mechanism until the FCC establishes an appropriate inter-carrier compensation mechanism for ISP-bound traffic. (Pet. App. 106a-107a).

C. DISTRICT COURT DECISION

Verizon sought review of the Maryland Commission's Order in the United States District Court for the District of Maryland. First, Verizon objected to the Maryland Commission's determination that Verizon should continue to pay reciprocal compensation for ISP-bound calls pursuant to the terms of previously approved interconnection agreements. Verizon also objected to the Maryland Commission's determination that CLECs who do not have approved interconnection agreements shall receive the arbitrated reciprocal compensation rates contained in the effective SGAT as an interim compensation mechanism.

[8] *Id.*, at para. 1. See, also, para. 22.

On October 20, 1999, the District Court dismissed Verizon's Complaint, holding that: (1) the Commission and the individual commissioners were immune from suit under the Eleventh Amendment;[9] (Pet. App. 77a-84a) (2) the Commission was an indispensable party under Federal Rule of Civil Procedure 19(b) so that the case could not proceed without the Commission; (Pet. App. 84a- 86a) (3) alternatively, Verizon's challenge to that portion of the Commission's Order relating to the SGAT was not ripe for review. (Pet. App. 86a-90a) and (4) the Eleventh Amendment would bar suit brought pursuant to 28 USC §1331. (Pet. App. 90a)

D. THE FOURTH CIRCUIT DECISION

Verizon and the United States Government appealed the District Court's decision. On February 14, 2001, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's decision. The Fourth Circuit reached four major conclusions. First, and foremost, the Court of Appeals found that a federal proceeding brought pursuant to §252(e)(6) of the 1996 Act against the Maryland Commission is constitutionally barred. The Fourth Circuit expressly found that Congress did not clearly manifest an intent to condition a state commission's participation in the regulation of interconnection agreements on a waiver of sovereign immunity from private suit. (Pet. App. 19a)

Second, and equally important, the Fourth Circuit also found that an action brought in federal court against the individual commissioners was constitutionally barred. Among other reasons, the Court of Appeals found that a

[9] Based on this holding, the District Court declined to address the Commission's agreement that the Court lacked jurisdiction to review Commission decisions **enforcing** interconnection agreements (Pet. App. 76a n.3)

federal court action against the State commissioners would improperly expand the federal remedy selected by Congress. (Pet. App. 29a)

The third determination by the Fourth Circuit was that §252(e)(6) does not confer jurisdiction on the federal courts to review a State commission's enforcement determinations. The Fourth Circuit found that because federal courts are courts of limited jurisdiction, determinations by State commissions that are not expressly designated for review in federal court are left for review by State courts. (Pet. App. 35a) The Court of Appeals then held that State commission orders administering and enforcing interconnection agreements are not §252 determinations (Pet. App. 47a) Thus, according to the Court, these orders are reviewable only by State courts. (*Id.)*

Finally, with regard to federal question jurisdiction, the Fourth Circuit held that 28 U.S.C. §1331 does not provide federal jurisdiction because Congress intended federal jurisdiction to be limited to the grant in 47 U.S.C. §252(e)(6). The Court of Appeals found that it "would be nonsensical to conclude that even though Congress carefully articulated jurisdictional responsibility in the 1996 Act, it nonetheless intended to have 28 U.S.C. §1331 override this effort." (Pet. App. 48a). According to the Fourth Circuit, "[t]he simple fact that interconnection agreements are "creations of federal law" does not make their interpretation a sufficiently substantial federal question to confer jurisdiction under 28 U.S.C. §1331." (Pet. App. 49a) (citations omitted)

ARGUMENT

A. THE FOURTH CIRCUIT'S HOLDING REGARDING 28 U.S.C. §1331 JURISDICTION DOES NOT MERIT FURTHER REVIEW.

Verizon alleges that the federal district court has jurisdiction under 28 U.S.C. §1331 to consider its allegations that the Maryland Commission's order violates the 1996 Act. Verizon is simply wrong in arguing that there is a certworthy conflict of authority between the Fourth Circuit's holding on the §1331 issue and the decision of the Sixth Circuit in *GTE North, Inc. v. Strand,* 209 F.3d 909, *cert. denied* 121 S.Ct. 380 (2000). The *Strand* decision is clearly distinguishable from the Fourth Circuit's ruling. Since no conflict exists among the circuits, certiorari on this issue should be denied.

In *Strand,* GTE challenged an order of the Michigan Public Service Commission issued pursuant to Michigan law. The Sixth Circuit found that although §252(e)(6) precludes federal review of interlocutory orders entered in the course of 1996 Act proceedings, the statutory provision does not preclude review of an order which was entered in an independent state law proceeding unrelated to an arbitration. *Id.* at 915.

In contrast, the Maryland Commission's order specifically involved the application of an FCC order interpreting the provisions of the 1996 Act. Verizon requested that the Maryland Commission find that pursuant to the FCC's *ISP Order* it was no longer obligated to pay reciprocal compensation for Internet traffic. The Maryland Commission expressly utilized the analysis sanctioned by the FCC in reaching its conclusion. (Pet. App. 98a-99a; 101a-103a).

Thus, the *Strand* decision is clearly distinguishable from the Fourth Circuit decision at issue in Verizon's Petition. The *Strand* Court held that §1331 jurisdiction was available to consider whether a State commission's order solely involving state law violated the 1996 Act. This state law question was not an issue in the Fourth Circuit appeal. Because there is no conflict between the two circuits, this Court should deny Verizon's Petition on this issue.

More importantly, the Fourth Circuit's determination on this issue is correct. Verizon misreads the Fourth Circuit's opinion and is simply mistaken in the manner in which it describes and criticizes the Fourth Circuit's decision. According to the Fourth Circuit, the exercise of §1331 general federal jurisdiction would undermine Congressional intent. (Pet. App. 48a) (citations omitted). The Fourth Circuit found that Congress created a limited federal right of review of State commission determinations and that Congress otherwise intended for the right of review to be exercised in State courts (Pet. App. 49a). The Fourth Circuit concluded that in light of the limited grant of jurisdiction in 47 U.S.C. §252(e)(6), the exercise of §1331 jurisdiction would undermine congressional intent. (Pet. App. 48a) (citations omitted)

Verizon's description of the Fourth Circuit's decision on this issue is misleading at best. Verizon's argument misses the point of the Fourth Circuit's discussion. The Court of Appeals found that in construing the reach of §1331, a court must look "carefully at the Congressional intent with respect to the federal statute in question to determine whether disputes under *that statute* were intended to be resolved in federal courts or State courts." (Pet. App. 49a) The Fourth Circuit cited *Jackson Transit Auth. v. Local Div.* 1285, *Amalgamated Transit Union*, 457 U.S. 15 (1982) for this proposition. Thus, the Fourth Circuit's determination

with regard to §1331 rested on *Congressional intent*. Verizon's discussion of state law versus federal law is simply irrelevant. A conclusion that such general jurisdiction exists would be contrary to the *Seminole* decision[10], which stands for the proposition that Congress' particular choice of remedies must be respected. Respect for Congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress created.

Furthermore, Congress has not abrogated the Commission's sovereign immunity pursuant to §1331. The Supreme Court has expressly held that §1331 does not suffice to abrogate immunity for all federal questions. *Blatchford v. Noatak*, 501 U.S. 775, 786 (1991). In light of this proposition, no reasonable argument could be made that §1331 constitutes an abrogation of state immunity. Similarly, *Ex parte Young* is inapplicable for the reasons discussed below.

Finally, Verizon's complaint does not meet the requirements for jurisdiction under 28 U.S.C. §1331. Verizon's argument incorrectly assumes that the only test for §1331 jurisdiction is whether the action "arises under" federal law. In reality, the "arising under" test is just the first step in the analysis. The district courts have that jurisdiction which Congress grants through statute. Even though Congress has conferred general federal question jurisdiction on the district courts under 28 U.S.C. §1331 in terms similar to the constitutional provision, the term "arising under" in the statute is narrower than the similarly defined constitutional power. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 495 (1983). Because federal question jurisdiction ultimately depends on an act of Congress, the scope of the

[10] *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

district courts' jurisdiction depends on the Congressional intent manifested in the statute at issue.

Section 1331 should be construed strictly and all doubts should be resolved in favor of State court jurisdiction. *Aetna Inc. Co. v. Chicago RI & PR Co.*, 229 F.2d 584, 586 (10th Cir. 1956). In the "vast majority" of cases where federal-question jurisdiction exists, federal law creates the plaintiff's cause of action. See, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986).

Courts begin with the presumption that if a statute does not expressly create a private cause of action, one does not exist. *See, Louisiana Landmarks Soc. Inc. v. City of New Orleans,* 85, F.3d 1119, 1123 (5th Cir 1996). By now, Congress is well aware of this presumption and how to provide private remedies. *See, Touche Ross & Co. v. Redington,* 442 U.S. 560, 572 (1979).

Under the settled framework for evaluating whether a private cause of action may be inferred from a statute, the questions to be resolved are whether the plaintiff is part of the class for whose special benefit the statute was passed; and whether the indicia of legislative intent reveals a Congressional purpose to provide a private cause of action. *Cort v. Ash*, 422 U.S. 66, 78 (1975).

Unless Congressional intent to create a private cause of action can be inferred from the language of the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981). Whether Congress has created an enforceable right is determined by its intent. *Smith v. Kirk*, 821 F.2d 980, 982 (4th Cir. 1987). Neither the language of

the 1996 Act nor its legislative history indicates that Congress intended to create a private cause of action.

The legislative history of the 1996 Act establishes that Verizon is not a part of the class for whose special benefit the statute was enacted. The Act itself expresses Congress' intent "to promote competition and reduce regulation in order to secure lower prices and higher quality services for ***American telecommunications consumers*** and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996). (emphasis added) In its report concerning the legislation, Congress specifically stated that:

> . . . in order to secure lower prices and higher quality services for **American telecommunications consumers** . . . The result will be lower prices to **consumers and businesses,** . . . a competitive edge for **American businesses,** . . . Indeed, the enormous **benefits to American businesses and consumers** from lifting the shackles of monopoly regulation . . .

H.R. Rep. No. 204, 104th Cong., 2nd Sess. 4748, *reprinted in* U.S. CCAN (March 1996) (emphasis added). Thus, it is clear that the 1996 Act was enacted to benefit consumers, not ILECs such as Verizon.

With regard to the second factor, an examination of the legislative history and statutory scheme presents no indication that Congress intended to create a private cause of action. The only express grant of federal jurisdiction in the 1996 Act is limited to suits brought by parties to interconnection agreements. 47 U.S.C. §252(e)(6). That

Congress expressly provided for a private cause of action in §252(e)(6) is evidence that when Congress wished to provide a private remedy, it knew how to do so and did so expressly. *Touche*, 442 U.S. at 572.

Consideration of the first two *Cort* factors is dispositive. The language of the statute and its legislative history do not suggest that the Act was intended to create federal rights for the benefit of a class of persons but rather was intended to benefit the public at large through a regulatory scheme to be administered in large part by the States. *See, California v. Sierra Club*, 451 U.S. 287, 298 (1981). Nor is there any evidence that Congress anticipated that there would be a private remedy. This being the case, it is unnecessary to inquire further to determine whether the purpose of the statute would be advanced by the judicial implication of a private action or whether such a remedy is within the federal domain of interest. These factors are only of relevance if the first two factors give indication of Congressional intent to create the remedy. *Id., citing, Touche,* 442 U.S. at 574-576.

The conclusion that the 1996 Act does not create a private cause of action negates Verizon's claim of federal subject matter jurisdiction. In the absence of a federal statutory cause of action, declaratory relief is available only when a federal statute totally precludes State regulation of the matter being litigated. In other words, the federal statute must have entirely occupied the field, preventing any state regulation of matters within the scope of the federal statute. *Western Air Lines, Inc. v. Port Authority of New York and New Jersey*, 817 F.2d 222, 225-26 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). See, also *Burgio and Campofelice, Inc. v. NYS Dept. of Labor*, 107 F.3d 1000, 1007 (2d Cir. 1997). A preemption cause of action for declaratory relief is not an alternative means for enforcing

the substantive provisions of the federal statute. *Western Air Lines v. Port Authority of New York & New Jersey*, 817 F.2d at 225-26.

The District Court of California reached the same conclusion concerning a challenge to §254 of the 1996 Act. In this case, the California Public Utilities Commission ("PUC") adopted two end-user surcharges to finance intrastate universal telephone service programs. The Utility Reform Network ("TURN") challenged this decision as being preempted by the Telecommunications Act of 1996. The California District Court found that an individual may challenge State regulations despite the lack of statutory cause of action only when a federal statute forbids State regulation of the area that the State is purporting to regulate. In other words, only when the federal statute had "occupied the field" thereby preventing any State regulation of matters falling within the scope of the federal statute. *Turn v. CPUC*, 26 F.Supp. 2d 208 (N.D. Cal. 1998) The California Court specifically noted that it was "not aware of any authority holding that a preemption cause of action may serve as a vehicle to challenge an otherwise permissible State regulation simply because it allegedly violates a substantive provision of a federal statute." *Id.* The Court concluded that the plaintiff could not challenge the CPUC's compliance with the substantive provisions of the 1996 Act by means of a preemption cause of action.

No reasonable argument could be made contending that the 1996 Act entirely preempts state regulation of local exchange service or local exchange carriers. Among a variety of other things, §252 requires a State commission to determine wholesale rates in the context of an arbitration. *See, e.g.*, §§251(c)(4) and (6); 251(d)(3); 251(f), 252, 253(b) and (f), 254 and 261(c).

This Court should find that the 1996 Act does not create a private cause of action, nor does it "occupy the field," thereby preventing any state regulation of matters falling within the scope of the federal statute. Given these conclusions, the Court should hold that the district court did not have jurisdiction pursuant to 28 U.S.C. §1331.

B. THE FOURTH CIRCUIT CORRECTLY HELD THAT THE ELEVENTH AMENDMENT MANDATES THAT THIS CASE BE DISMISSED.

The Fourth Circuit correctly found that the Maryland Commission did not constructively waive its sovereign immunity. In *College Savings,* the Supreme Court repudiated the doctrine of constructive waiver under the Commerce Clause. The Court rejected the idea of implied waiver of state sovereign immunity as incompatible with its cases requiring an express waiver of immunity by the State itself. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680 (1999). *College Savings* confirmed that a State's waiver must be a deliberate, express waiver made by the State itself and that such waiver cannot be implied. *Id.* at 680-83.

As this Court has previously held, a state does not consent to suit in federal court simply by engaging in federally regulated conduct even where Congress has provided that the state will be subject to private suit if it engages in that conduct. *Id.* Under the 1996 Act, the State commissions are merely agreeing to obey federal laws in participating in a federal program. Agreeing to obey federal law does not constitute an agreement to be sued in federal court. See, *Innes v. Kansas State University*, 184 F.3d 1275, 1283 (10th Cir. 1999).

Any argument based on constructive waiver presupposes that Congress has the authority pursuant to Article I §8, Cl.3 of the United States Constitution to force a State to waive its Eleventh Amendment immunity as a condition of participating in a field subject to federal regulation. However, the *Seminole* Court stated in no uncertain terms, that "the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 72-73 (1996). Thus, as noted by the *College Savings* Court, the *Seminole* decision "expressly repudiates" the proposition that Congress has authority, under the Commerce Clause, to expand Federal jurisdiction. *College Savings,* 527 U.S. at 683. Therefore, allowing federal courts to apply the doctrine of constructive waiver based on Congress' commerce powers would directly contravene the Supreme Court's express repudiation of this doctrine in *Seminole.*

Because Congress has no authority under its Article I Commerce Clause powers to abrogate state sovereign immunity, *Seminole* 517 U.S. at 71-72, it follows that Congress may ***not*** make the waiver of sovereign immunity a condition to the state's action in a field that Congress has authority to regulate under the Commerce Clause. In the present case, where Congress is not empowered to abrogate the Eleventh Amendment immunity conferred upon the Commission directly, likewise it cannot do so indirectly through principles of constructive waiver. The Maryland Commission has not waived its immunity by participating in the regulation of telecommunications. The telecommunications industry indisputably involves a quintessential state interest - the provision of telecommunications services to the citizenry at competitive

rates - protection of which Congress cannot condition on a state's waiver of vital state rights.

Furthermore, the conclusion that Congress could have excluded states from any role in the 1996 Act is irrelevant to determining whether a state has constructively waived its immunity. Under this analysis, Congress would be permitted to do indirectly what it cannot do directly, namely, abrogate a state's immunity pursuant to the Commerce Clause by making abrogation a "condition" of participation. Since the Supreme Court has previously ruled that Congress cannot abrogate states' immunity through the Commerce Clause, it would be illogical to permit Congress to condition any "gift" on accepting abrogation of Eleventh Amendment immunity pursuant to this very same constitutional provision.

The linchpin of any constructive waiver argument is the contention that the 1996 Act constitutes a "gift". Verizon argued below that §252(c)(5) rendered the State's participation in the 1996 Act voluntary because the FCC would take over the responsibilities of any state who "chooses" not to participate. However, this interpretation of §252(c)(5) is overly broad and contrary to the plain meaning of that provision. Section 252(e)(5) states:

> "if a State commission fails to act to carry out its responsibility under this section **in any proceeding or other matter** . . . the [FCC] shall issue an order preempting the State commission's jurisdiction **of that proceeding or matter** . . . and shall assume the responsibility of the state commission . . . **with respect to the proceeding or matter** . . . . " (emphasis added)

Clearly, this provision envisions the FCC assuming jurisdiction over discrete proceedings or matters, not taking over wholesale responsibility for telecommunications regulation in a state. This conclusion is supported by the Joint Committee of Conference Report which described the Senate provision as requiring that the FCC "shall assume the responsibilities of the State in the **applicable proceeding or matter**." H.R. Conf. Rep. No. 104-458 (1996), reprinted in 1996 U.S.C.C.A.N. 124 (emphasis added) Congress could not have contemplated the FCC taking full responsibility for regulatory local service in the states. The reason the states are included in the 1996 Act is not "in the spirit of federalism" but because the federal government is incapable of regulating such a vast industry on its own. Essentially, Congress is using the States to implement a program that the federal government would be incapable of carrying out on its own.

Maryland's experience with opening the local market to competition demonstrates that the 1996 Act was not a "benefit" but an unwarranted intrusion. Maryland's only "gains" under the 1996 Act were a loss of autonomy. Prior to the 1996 Act, Maryland had sole authority over its local exchange market and had begun opening this market in 1994.[11] After the Congressional enactment, Maryland is now forced to share that authority with the FCC and can even be preempted by that agency. Certainly no reasonable person would interpret this outcome as a "benefit" or "gift" to Maryland. In actuality, all the benefits flowed to the FCC, which is permitted to usurp the State's traditional regulatory authority.

[11] *Re MFS Intelenet of Maryland, Inc.* 85 Md. PSC 38 (April 25, 1994). *Re MFS Intelenet of Maryland, Inc.*, Phase II, 86 Md. PSC 467, 470-71 (Dec. 28, 1995).

Furthermore, participation by the states in the 1996 Act's regulatory scheme was not voluntary. Regulation of local exchange carriers traditionally has been within the police powers of the State. The telecommunications industry indisputably involves a quintessential "state interest" - the provision of telecommunications services to the citizenry at competitive rates-protection of which Congress cannot condition on a state's waiver of vital rights. Upon passage of the 1996 Act, a state was forced to either abide by the federal regulations or cede its power to regulate to the FCC (a classic Hobson's choice). The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that any court should perceive as voluntary.

The 1996 Act passed the "point of coercion" because the effect of Maryland's refusal to waive its immunity is the exclusion of the State from an otherwise lawful activity. *See, College Savings,* 527 U.S. at 687. Under the 1996 Act, a State has the choice of seeing its commission frozen out of effective enforcement of state-related service and interconnection issues, as well as federal matters under §§251 and 252, **or** the State is stripped of its immunity from federal judicial review. The states are thus denied that "dignity and respect" to which a sovereign state is entitled.

There is no arguable basis to conclude that the State's continued regulation of local telephone carriers is a "benefit" from Congress, which justifies constructive waiver of Eleventh Amendment immunity. This Court should hold that abrogation of Eleventh Amendment immunity as the price of "opting into" the scheme created in §252 is an invalid option in light of *Seminole* and *College Savings.* Therefore, the Maryland Commission's Eleventh Amendment immunity was not waived through its

participation in §252 arbitration proceedings. The 1996 Act's requirement of federal review is unconstitutional.

C. THE FOURTH CIRCUIT'S HOLDING THAT THIS PROCEEDING DOES NOT MEET THE REQUIREMENTS OF THE *EX PARTE YOUNG* EXCEPTION ALSO IS CORRECT.

Argument that jurisdiction exists pursuant to the *Ex parte Young*[12] ignores the changes to this doctrine engendered by the *Seminole* decision. Application of the *Seminole* doctrine leads to the conclusion that finding jurisdiction under *Ex parte Young* in this instance would be inappropriate. In *Seminole*, this Court found that when a statute implies that Congress intended an alternative, specific form of relief, be available to enforce compliance with that statute, a court should infer that Congress did not intend the federal court to provide traditional *Ex parte Young* injunctive relief.

The remedial scheme of the 1996 Act includes a federal court remedy to allow for a review of an interconnection agreement to determine whether the agreement complies with §§251 and 252. But this federal court remedy does not contemplate injunctive relief. In addition, the 1996 Act imposes no set of judicial sanctions against a State commission for failure to timely adhere to the expedited timetable. Clearly, the federal court relief available under §252(e)(6) is far less onerous than the relief that would be available pursuant to an *Ex parte Young* suit. Section 252(e)(6) only allows for a review of an interconnection agreement whereas an *Ex parte Young* action against a State commission would expose the Commissioners to the full remedial powers of a federal court, including

[12] *Ex parte Young*, 209 U.S. 123 (1908).

presumably, contempt sanctions. Thus, to allow an *Ex parte Young* action against the Commissioners would be to "rewrite the statutory scheme", render superfluous the limited statutory remedy provided under §252(e)(6) and would permit the plaintiff to obtain relief against the individual Commissioners that they could not otherwise obtain pursuant to §252(e)(6).

Any attempt to achieve jurisdiction through the *Ex parte Young* fiction rather than through a §252(e)(6) action will frustrate Congress' clear intent that the 1996 Act provides the ***exclusive*** remedies against the State commissions. Like the statute in *Seminole*, §252(e)(6) does not "stand alone" but was created in the context of a carefully crafted statutory scheme. Just as the *Seminole* Court refused to replace Congress' unconstitutional attempt to abrogate states' immunity with a judicially created remedy, so to should this Court refuse to apply *Ex parte Young* to the 1996 Act. It is illogical to infer that Congress intended to subject State Commissioners to broad federal injunctive relief and contempt powers. Congress would have expressly provided for such a significant remedy had it intended to do so.

Another factor militating against use of *Ex parte Young* relief is the fact that Congress clearly intended for §252(e)(6) actions to proceed against State commissions, not individual commissioners. In *Seminole*, the Court looked to the federal statute at issue and determined that it was not Congress' intent to create a cause of action against the state officials, relying on a literal reading of the statute to support this analysis. According to the Court, where a statutory scheme unmistakably authorizes a state or its agency to act, as opposed to an individual state official, *Ex parte Young* does not provide a vehicle whereby relief may be obtained. *Seminole*, 517 U.S. at 75 n.17. The *Seminole* Court

determined that absent explicit Congressional authorization, courts should not permit the use of an *Ex parte Young* action to negate a State's sovereign immunity. Thus, in order to determine whether Verizon's action against the Commissioners may proceed, this Court is required to determine whether Congress intended to limit the availability of *Ex parte Young* suits over a cause of action brought under the 1996 Act.

In the 1996 Act, **all** of the provisions in §§251 and 252 refer to the "State Commission" or "the State" and **none** of the provisions refer to individual State commissioners. Section 252(e)(6), the statutory provision relied upon by the plaintiffs to initiate this case, is entitled "Review of State Commission Actions". That heading alone implies that an appeal will be filed against the State Commission. Section 252 refers forty-five times to the "state commission" with four such references contained in the subsection headings. See, 47 U.S.C. §§252(b)(4)(e), (e)(6), and (f)(2). Section 252 never refers to individual state commissioners. This overwhelmingly demonstrates that Congress designed the §252(e)(6) action to proceed against the **State commission**.[13]

The Congressional remedy crafted into the 1996 Act does not authorize a suit against a state official as required by *Seminole*, 517 U.S. at 75. Congress' remedial scheme does not include state commissioners as parties to actions brought under §252(e)(6). "When Congress crafts particular remedies for particular wrongs, the presumption is that these are the exclusive remedies and that such limitations as they

[13] In fact, the actions Verizon complained of could not be accomplished by any of the five Maryland Commissioners acting alone. The Maryland Commission only can act by majority vote on such a matter. It is the action of the Maryland Commission as an entity that is required under the 1996 Act as a prerequisite to judicial review by this Court, not the actions of the individual Commissioners.

may embody are not to be circumvented . . . " *McDonnell v. Cisneros*, 84 F.3d 256, 261 (7th Cir. 1996). The fact that Congress created on unconstitutional remedy, which allowed for suit against the State, should not change this result.

D. THE FOURTH CIRCUIT CORRECTLY FOUND THAT FEDERAL DISTRICT COURTS LACK SUBJECT MATTER JURISDICTION OVER THE ENFORCEMENT DECISIONS OF STATE COMMISSIONS.

In the proceedings below, the Maryland Commission argued that the district court lacked subject matter jurisdiction over enforcement decisions rendered by State commissions. The Fourth Circuit agreed with this contention. This conclusion is supported by the plain language of the 1996 Act.

First, and foremost, the explicit language of §252(e)(6) compels the conclusion that federal district courts lack subject matter jurisdiction over enforcement decisions. Section 252(e)(6) only purports to grant jurisdiction "to determine whether on agreement or statement meets the requirements" of the 1996 Act. Under the plain language of this section, federal jurisdiction only extends to the review of a decision approving or rejecting an interconnection agreement. This conclusion is buttressed by §252(e)(4) which only preclude state court jurisdiction "to review the action of a State commission in approving or rejecting an agreement . . ." (emphasis added) This section is silent as to the enforcement of the terms and conditions of an interconnection agreement. Therefore, there is no basis to conclude any complete preemption of state review in the last sentence of §252(e)(4). In addition, the Conference Report fails to mention, let alone discuss, the judicial review procedures to suggest any specific Congressional purpose.

H.R. Conf. Ref. No. 104-458, at 124-126 (1996). Read properly, §§252(e)(4) and 252(e)(6) only grant jurisdiction to review the terms of an agreement, jurisdiction over enforcement of these terms is not granted.

Thus, the 1996 Act does not expressly preclude review of enforcement decisions by State courts. The permissive language of §252(e)(6), coupled with the specific exclusion contained in §252(e)(4), leads inescapably to the conclusion that Congress did not intend to totally divest State courts of jurisdiction. If Congress had wanted to preclude State court review of enforcement decisions under the 1996 Act, it would have used explicit language as it did in §252(e)(4). See, e.g., *Charles Dowd Box Co. v Courtney*, 386 U.S. 502, 507-508(1962).

Furthermore, Section 601(c)(1),[14] in conjunction with 252(e)(4), strongly suggests that **no implied** federal court authority regarding enforcement actions can be read into 252(e)(6). The Commission contends that a finding of federal jurisdiction through implication violates the Article III limitations on federal district courts.

Furthermore, Congress did not unequivocally express its intent to abrogate the Commission's Eleventh Amendment immunity with regard to enforcement decisions. See, *Seminole*, 517 U.S. at 55. Congressional intend to abrogate the States' immunity from suit must be obvious from a "clear legislative statement." *Seminole*, 517 U.S. at 55. No clear legislative statement regarding judicial review of the **enforcement decisions** of state commissions is contained within §252(e)(6) of the 1996 Act. This action for enforcement of an agreement is one step further removed

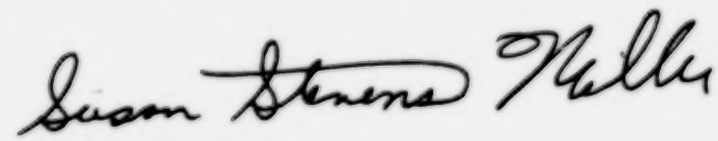
[14] §601(c)(1) provides that "this act and the amendments made to this act shall not be construed to modify, impair, or supercede Federal, State or local law unless expressly so provided in such Acts or amendments."

from Congressional intent to provide for federal court review to determine whether the agreement or statement meets the requirements of §252(e)(6). This Court has made clear that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Atascadero v. Scanlan*, 473 U.S. 234 (1985).

CONCLUSION

The Maryland Commission does not oppose certiorari insofar as Verizon seeks review of the Fourth Circuit's holdings concerning constructive waiver, the application of the *Ex parte Young* doctrine and the extension of §252(e)(6) jurisdiction to enforcement decisions of State commissions. In all other respects, the petition for certiorari should be denied.

Respectfully submitted,



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